United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1030

B P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1031

UNITED STATES OF AMERICA,

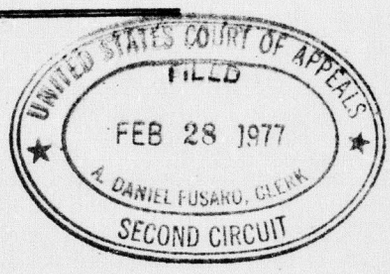
PLAINTIFF-APPELLEE,

V.

ARLO LEWIS,

DEFENDANT-APPELLANT.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT



BRIEF OF APPELLANT
ARLO LEWIS

ON THE BRIEF:

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A. THE DEFENDANT HAD, EARLIER IN THE DAY, REFUSED TO ANSWER QUESTIONS UNTIL HE HAD CONSULTED WITH AN ATTORNEY, AND

B. IT WAS THE PRODUCT OF AN EARLIER ILLEGAL CONFESSION TO HARTFORD DETECTIVE EDGAR CAMPBELL.

II. THE ARREST WARRANT WAS NOT BASED UPON PROBABLE CAUSE, AND THE STATEMENTS TAKEN BY EXPLOITATION OF THE ARREST SHOULD BE SUPPRESSED.

STATEMENT OF THE CASE

On September 17, 1976, a Federal Grand Jury sitting in Hartford, Connecticut, returned a one-count indictment charging Arlo Lewis with bank robbery. Title 18, United States Code, Section 2113(a).

On September 24, 1976, the appellant was arraigned before a United States Magistrate in Hartford and entered a plea of not guilty.

On October 8, 1976, the appellant filed four motions including a motion to suppress statements made to government agents.

On November 2 and 4, 1976, a hearing on the motion to suppress was held before The Honorable M. Joseph Blumenfeld, Judge of the United States District Court, District of Connecticut, and the court reserved decision.

On December 9, 1976, the court orally denied the motion to suppress from the bench and appellant pled guilty to a substitute information charging him with stealing bank funds in violation of Title 18, United States Code, Section 2113(b) (App. 5a).

On January 3, 1977, the appellant received a sentence of three years and on the same day Judge Blumenfeld filed a 30-page written ruling on appellant's motion to suppress. With the agreement of the Office of the United States Attorney and the court, appellant was permitted to plead

guilty specifically preserving the right to appeal the denial of his motion to suppress.

On Saturday, July 10, 1976, two black males robbed the United Bank and Trust Company, Windsor, Connecticut. On July 16, 1976, a state warrant for the arrest of Arlo Lewis was issued upon the affidavit of Windsor, Connecticut Police Officer Everett Laurence Overstrum. The supporting affidavit states that Overstrum investigated the robbery with Special Agent Harry Willis of the Federal Bureau of Investigation. It further states that Overstrum and Willis showed a spread of photographs to bank manager Joseph R. Lupacchino, Jr., who identified Arlo Lewis as one of the bank robbers. Overstrum's affidavit does not disclose that photographs also had been shown to six other persons who were unable to identify anyone in the spread as being one of the robbers, although he was aware of this fact (App. 5b-5c, 7, 36-37).

On Saturday morning, July 17, 1976, Windsor, Connecticut Police Officer Overstrum, Hartford Officer Madison Bolden, and FBI Special Agents Willis and David Miller arrested Arlo Lewis in his Hartford apartment, pursuant to the state arrest warrant. At that time, Lewis was orally given Miranda warnings, first by Overstrum and shortly thereafter by Special Agent Miller. Lewis said nothing in response to these warnings. On July 16, 1976, the night before the arrest, Lewis had been stabbed by his girl friend during an argument. He received a wound the

size of one centimeter in his chest. In addition, Lewis, 24 years old, has been a heroin addict for 11 years. He had not injected any drugs into his system on July 16 (App. 8).

Following his arrest, Lewis was taken by the state officers and FBI agents from his Hartford apartment to the Hartford police station. At 9:41 a.m., in the "interrogation room" of the station, he was again given Miranda warnings by FBI Agent Willis. At 9:44 a.m., Lewis executed an "Interrogation Advice of Rights Form," acknowledging that he understood his rights. He stated that he "didn't want to say anything until [he] saw a lawyer." After his statement, Special Agent Willis asked him when he had last seen Wayne Brown, his alleged accomplice. Lewis responded that he had seen Brown on July 10, 1976, the day of the bank robbery. No further questions were asked of Lewis at that time. Following the interview, he was placed in a cell in the "lockup" of the Hartford police station (App. 8).

At approximately 5:30 p.m. that afternoon, Lewis initiated a conversation in the "lockup" area with Hartford Police Detective Edgar Campbell, whom he knew from his neighborhood. Lewis began the conversation by asking Detective Campbell to give a message to his girl friend. Campbell then asked Lewis what he was doing in the Hartford "lockup" and Lewis responded that he had been arrested for the Windsor bank robbery. During the course of the ensuing conversation, Campbell, who

was not investigating the Windsor bank robbery, said that he had seen "a beautiful photograph of the bank holdup" and that Windsor police officers had shown him a photograph of Lewis and said that they wanted him for the robbery. No evidence of the existence of this photo was ever presented. He urged Lewis to cooperate with the FBI. Lewis then admitted his participation in the bank robbery. At no time did Campbell give Lewis Miranda warnings. The conversation with Campbell concluded at approximately 6:15 p.m.

At the end of the conversation with Campbell, Lewis asked him to inform FBI Agent Willis that he wanted to speak to him (App. 9-10).

At 8:20 p.m., Special Agent Miller arrived and advised the appellant of his rights. At 8:30 p.m., Lewis executed a second "Interrogation Advice of Rights Form." During that 10-minute period, Special Agent Miller discussed the form with Lewis. In view of Lewis' earlier desire to consult with counsel, Miller wanted to assure himself that "Lewis realized exactly what he was doing," but he never asked Lewis why he no longer wished to have an attorney (Tr. 234).

Following the execution of the "Interrogation Advice of Rights Form," Lewis confessed to Miller about his participation in the bank robbery. These statements were transcribed, and after reading them, Lewis signed them at 10:05 p.m. (App. 11).

ARGUMENT

I. THE DEFENDANT'S CONFESSION TO AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION ON THE EVENING OF JULY 17, 1976, WAS ILLEGAL AND SHOULD BE SUPPRESSED BECAUSE:

A. THE DEFENDANT HAD, EARLIER IN THE DAY, REFUSED TO ANSWER QUESTIONS UNTIL HE HAD CONSULTED WITH AN ATTORNEY, AND

B. IT WAS THE PRODUCT OF AN EARLIER ILLEGAL CONFESSION TO HARTFORD DETECTIVE EDGAR CAMPBELL.

A. As the record makes clear, defendant Lewis was given proper Miranda warning by Special Agent Miller on the evening of July 17, 1976, at the Hartford Police lock-up (App. 10). Earlier that day, however, the defendant, while in the same detention cell, had stated to the same agents, who were investigating the same crime, that he "didn't want to say anything until [he] saw a lawyer" (App. 8). The question is whether the defendant in light of his morning refusal to talk can validly waive his right to remain silent later that day.

Miranda v. Arizona, 384 U.S. 436 (1966), sets out the warnings which must be given to a defendant in custody before police officers can initiate questioning. Undoubtedly, the defendant can waive these rights and speak to officers with or without counsel. But if the government attempts to use these statements of the defendant in its case in chief,

it must carry a heavy burden in demonstrating that there was a knowing and intelligent waiver of the privilege against self-incrimination. Miranda, supra at 475; Lego v. Twomey, 404 U.S. 474 (1972).

The defendant concedes that under certain narrowly defined circumstances a defendant who indicates a desire to remain silent may subsequently change his mind and answer questions posed by law officers. As the Second Circuit has held, Miranda does not require questioning cease forever but only until "new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has changed his mind." United States v. Collins, 462 F.2d 792, [illegible], 802 (2d Cir.) (en banc), cert. denied, 409 U.S. 988 (1972).

The test to determine if a suspect "has changed his mind" is difficult to apply. In Michigan v. Mosley, 423 U.S. 96 (1975), the majority found that a suspect who initially stated that he wished to remain silent had later waived his rights by agreeing to talk after valid Miranda warnings were given. In Mosley, however, the suspect was interrogated on a different floor by different officers about a totally different crime than the one he earlier had refused to discuss. The later interrogation was so fundamentally distinct from the earlier interrogation as to justify the later questioning of Mosley. cf. United States v. Clayton, 407 F. Supp. 204, 207 (E.D. Wis. 1976). None of the factors present in Mosley, as

previously stated, are present in the case now before the court. In the Lewis case, the questioning by Agent Miller was simply a renewal of the earlier abortive interview. Although the time frame between the two interviews was longer in the present case than in Mosley, waiver or lack thereof should not depend on some "unspecified" time period," as Justice White pointed out in his concurring decision in Mosley. Michigan v. Mosley, supra at 107 (White, J., concurring).

Even if the court rejects a per se rule of exclusion, there is enough compulsion or duress present here to exclude the confession to Agent Miller. Lewis had repeatedly told the FBI during the morning interview that he did not wish to discuss the case without an attorney (Tr. 72). He had been held all day Saturday in a filthy detention cell (Tr. 75, App. 8), and he knew he would not be arraigned until Monday (Tr. 73-74) and he was tricked into incriminating himself by Officer Campbell (App. 9) at a time when he was suffering at least some discomfort from heroin withdrawal and a chest wound (App. 7-8). While none of these factors alone may justify a finding of involuntariness in the confession, collectively they weigh heavily against the government's claim that they have sustained their heavy burden.

Because Mosley, supra, and Collins, supra, did not involve an initial remaining silent coupled with a request for the assistance of counsel, the present case is vastly different than those cases. As Miranda itself said in plain, unambiguous

language, "[I]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda, supra at 474. In commenting upon this language in his concurring opinion in Mosley, Justice White held that Miranda created "a per se rule against further interrogation after assertion of a right [to have counsel present] . . . ." Mosley, supra at 109-110. This type of situation is markedly different than a mere assertion of a desire to remain silent. Mosley, supra at 101 n.7, 110.

At least one court has relied upon Justice White's statement to find a per se rule excluding subsequent questioning. United States v. Flores-Calvillo, No. 75-3758, 19 Cr.L. 2405 (9th Cir., July 14, 1976), pending petition for rehearing en banc. If this plain language of Miranda and Justice White's concurring opinion in Mosley mean something other than it appears, the court should await a more specific interpretation from the Supreme Court.

> "As we interpret the plain language of Miranda, the words 'the interrogation must cease,' if the individual in custody asks for an attorney, mean exactly what it says. Any other interpretation must await a decision by the Supreme Court." United States v. Kinsman, 540 F.2d 1017, 1019 (9th Cir. 1976).

Even if this court follows the reasoning of the court below and rejects a per se rule of exclusion, it does not mean that it should adopt the relatively lax standard of Mosley in a situation where the suspect seeks legal assistance. The

court below found two factors of paramount importance in reaching its decision that Lewis waived his right to counsel.

The first factor the court relied on was the fact Lewis asked Officer Campbell to call the FBI back so that he could make a statement (App. 9-10). But Lewis only did this moments after he was told by Campbell that a "beautiful photograph of the hold-up" existed and that he had seen a photograph of Lewis in the possession of the Windsor police (App. 26). It is interesting to note that the government never produced this "beautiful photograph," during the suppression hearing, and the photographs of Lewis produced at the trial of co-defendant Brown were the most unrecognizable defense counsel has ever seen. While it may be permissible for police officers to encourage confessions from suspects, this certainly cannot be the case when the officer lies to the suspect and fails to give Miranda warnings. Thus Lewis' request to Campbell to "contact the agent at his home" (App. 2[illegible]) cannot be deemed a voluntary act and should not be given any weight in determining if there has been a waiver. It is such a situation as presented here that Justice White was referring to when he instructed trial courts to "view[ed] with skepticism" a suspect's reversal of a prior desire to have counsel present. Michigan v. Mosley, supra.

Secondly, the trial court stresses the thoroughness of Agent Miller's review of Miranda rights with the defendant

on the evening of July 17, 1976 (App. 29). Significantly, Miller never asks Lewis whether he had spoken to an attorney or even why he now sought to abandon his previous claim to assistance of counsel. Lewis claimed, at the suppression hearing, that he felt an attorney would not be made available anyway. Since it was a Saturday and court would not be in session until the following Monday (Tr. 73-74), frustration and disbelief in the possibility of ever seeing an attorney may have effected Lewis' decision. The court should not be oblivious to the defendant's limited education (Tr. 63). If Agent Miller had only briefly inquired as to the reason for abandoning the earlier claim for counsel, this case would be a much different posture (Tr. 233-235). Under the circumstances, it cannot be said that the defendant unequivocally indicated to Miller that he no longer wished to see an attorney. United States v. DeLeon, 412 F. Supp. 89, 100 (D.V.I. 1976).

While courts outside the Ninth Circuit have not accepted a per se rule, more than the ordinary signing of a waiver of rights form is required of the government if it is to sustain its heavy burden. United States v. Clark, 469 F.2d 802, 807 (4th Cir. 1974). While no court explicitly sets out what law enforcement officers should do in the present situation, some analogous suggestions are presented by the dissent in Mosley, supra at 116 (Brennan, J., dissenting). A resumption of questioning of Lewis should have awaited the arrival of a public defender. If he saw the public defender and still

desired to talk, the government would have met its burden. Similarly, if after the arrival of the public defender at the detention cell, Lewis had indicated in writing he did not wish to speak to this individual, perhaps questioning of him could then proceed:

> "I do not wish to imply that counsel may be forced on a suspect who does not request an attorney and suggest only that either arraignment or counsel must be provided before resumption of questioning to eliminate the coercive atmosphere of in-custody interrogation." Mosley, supra at 116 n.4.

The record is barren of any attempt by anyone to either have Lewis arraigned or to seek a public defender. While the majority in Mosley may not require these safeguards as a prerequisite to re-questioning a suspect, it is implied that it would surely require them in a situation where the accused had earlier sought counsel. "The court itself apparently proscribes resuming questioning until counsel is present if an accused has exercised the right to have an attorney present at questioning. Ante, at 101 n.7." Michigan v. Mosley, supra at 116 n.4.

B. Having admitted his involvement in the robbery to Campbell, Lewis claimed he felt he had nothing further to lose by giving a full formal confession to the FBI agents, who arrived shortly after 8:00 p.m. While this statement was preceded by proper Miranda warnings from Agent Miller, it should be excluded from evidence under the cat-out-of-the-bag theory.

United States v. Bayer, 331 U.S. 532, 540 (1947); Darwin v. Connecticut, 391 U.S. 346, 350 (1967).

> "Of course after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag." Bayer, supra at 540.

Of course, there may be instances where due to the passage of time or other intervening circumstances, the second confession may be purged of the primary taint of the original illegal confession. cf. Knott v. Howard, 511 F.2d 1060, 1061 (1st Cir. 1975). Courtshave even found that when a second voluntary confession is given many days after an involuntary confession, the latter one will be suppressed. Beecher v. Alabama, 389 U.S. 35, 38 (1967); Clewis v. Texas, 386 U.S. 707, 710 (1966). Since only an hour or two separated Lewis' involuntary admissions to Campbell and his formal confession to Miller, the latter should also be suppressed. The government, moreover, has the burden of proving this second confession was not the product of the original illegal admission. Darwin v. Connecticut, supra at 351; Harrison v. United States, 392 U.S. 219, 222-224 (1967); Brown v. Illinois, 442 U.S. 590, 603-604 (1975).

Even disregarding the earlier admission to Campbell and the fact Miller returned to the lock-up on Lewis' request, more should have been required from the FBI before they questioned Lewis. Although Miller sought and obtained an acknowledgment

of rights form, he should have attempted to determine why Lewis was suddenly abandoning his right to remain silent and his earlier request for the presence of counsel. United States v. Flores-Calvillo, supra.

The trial court places its reliance on this court's decision in Tanner v. Vincent, 541 F.2d 932 (2d Cir. 1976). In that case, only a marginal and highly questionable violation of Miranda occurred at the first interview with New York police. Tanner v. Vincent, supra at 934 n.1. Even rejecting a per se rule of exclusion as the court did in Tanner, the totality of circumstances clearly call for suppression of the statement to Miller. Unlike Tanner, the admissions to Officer Campbell were not preceded by a marginally defective Miranda warning but by no warning at all. Although FBI agents had given Lewis his Miranda warnings earlier in the day, they persisted in questioning him despite his request to have an attorney (App. 24). It serves no purpose to reiterate the deception perpetrated by Campbell, Lewis' physical condition, the closeness in time between the Campbell statement and the confession to Willis, and the long detention without presence of counsel. All these factors serve to distinguish Tanner from the present case, even on a totality of circumstances test.

II. THE ARREST WARRANT WAS NOT BASED UPON PROBABLE CAUSE, AND THE STATEMENTS TAKEN BY EXPLOITATION OF THE ARREST SHOULD BE SUPPRESSED.

A. The Warrant Affidavit (App. 36) Is Insufficient On Its Face.

The appellant was arrested for bank robbery pursuant to a warrant issued July 16, 1976, by Judge Morgan Kline of the Connecticut Court of Common Pleas. The application for the warrant, sworn out by Windsor Police Detective E. Laurence Overstrum alleged only the following:

1. The bank was held up by two men, of whom the police had general descriptions.

2. A warrant for the arrest of Wayne Brown had been issued as "Subject #1."

3. An unnamed confidential informer told the affiant that on the day of the robbery, Wayne Brown admitted committing the robbery to him.

4. The informer is a "known associate" of Wayne Brown.

5. The informer said that "Subject #2" is an "associate" of Wayne Brown named "Arlo."

6. According to "further investigation," "Arlo" is the appellant.

7. It has been "found that" the appellant fits the description of "Subject #2" and that the appellant is a "known associate" of Brown.

8. The manager of the bank, who was present during the robbery, "identified the photograph" of the defendant as "Subject #2" from an array of "seven like police photographs."

Ruling at 11-12, App. 16-17. For the following reasons, these allegations, looked at in a common-sense rather than a hyper-technical fashion, United States v. Ventresca, 380 U.S. 102 (1965), do not amount to probable cause for arrest.

No basis is given in the affidavit to credit the hearsay of the unnamed informer that the second bank robber was "Arlo," an "associate" of Brown. The most that can be said about the informer is that he once came by important information in a reliable manner (Brown's admission). The affidavit does not suggest that the informer has previously given accurate information or that he is speaking against his penal interest (quite the contrary). This is no suggestion that the affiant's informer is an innocent eyewitness or an accomplice. Compare United States v. Rueda, No. 76-1429 (2d Cir., February 10, 1977), slip op. 1765. In the absence of any such indication of credibility, the hearsay is insufficient. Aguilar v. Texas, 378 U.S. 108 (1964); compare United States v. Harris, 403 U.S. 573 (1971). Nor does the affidavit suggest that the source of the informer's hearsay information is reliable. No source whatever is suggested for the informant's claim that "Subject #2" is one "Arlo," an "associate" of Brown. The informer does not claim personal knowledge, nor does he claim to have heard an admission of the appellant or of Brown on this subject. The second Aguilar "prong" is thus also missing. Spinelli v. United States, 393 U.S. 410, 416 (1969).

In assessing probable cause, then, this court must look to whether the informer's hearsay is sufficiently corroborated.

Spinelli, supra at 415; United States v. Sultan, 463 F.2d 1066, 1069 (2d Cir. 1972). The information tying the informer's "Arlo" to the appellant is contained in items 6 and 7: that "further" unspecified "investigation" says so, and that the appellant was a "known associate" of Brown (already identified as one of the bank robbers) who met the appropriate description. The problem is that no source is given for any of this information. For all the issuing judge knew, it could as easily have come from police files or direct surveillance as from neighborhood gossip. When the affidavit states only a conclusion, without any of the underlying facts, the inference-drawing role of the magistrate is defeated and the affidavit becomes worthless. Nathanson v. United States, 290 U.S. 41, 47 (1933). Moreover, even if the judge could assume that the "further investigation" was reliable, it does little to corroborate the tip. That a person has a certain first name and meets a general description, together with association with someone whom there is reason to arrest, is not probable cause. United States v. Rosario, 543 F.2d 6 (2d Cir. 1976). The real issue, then, as the court below recognized, is whether the report of a photo spread identification of the appellant by the bank manager sufficiently corroborated the tip to support the warrant. Judge Blumenfeld pointed somewhat dubiously to United States v. Smith, 467 F.2d 283 (9th Cir. 1972) (per curiam), cert. denied, 410 U.S. 912 (1973), in which the simple allegation that the bank

manager identified a photo of the appellant was held in a per curiam opinion, without elaboration, to be probable cause to arrest for bank robbery. Ruling at 13, App. 18. There is good reason (illustrated by the facts of this case, see Point IIB infra) why a single identification from a photo spread should be insufficient corroboration of an anonymous informer's tip which has failed the Aguilar test. Eyewitness identification is notoriously unreliable, especially identification from photographs. See Simmons v. United States, 390 U.S. 377 (1968); United States v. Wade, 388 U.S. 218, 228-29 (1967); Brathwaite v. Manson, 527 F.2d 363, 369 (2d Cir. 1975), cert. granted, 96 S.Ct. 1737 (1976). Unless some elaboration is given, a single photographic identification should not be accepted. Here, the affiant offered nothing to encourage reliance on the bank manager's choice of a photograph. The language of the affidavit ("identified") would cover a wide range of situations, all the way from "I'm sure this is the one" to "Of the seven you showed me, this is the closest." Nor does the affidavit reveal how long the witness saw "Subject #2" or from what vantage point. (His testimony revealed that the view was less than four seconds, sidelong, while going down from his chair to a prostrate position on the floor.) Information of so uncertain a quality should not be relied upon to justify the serious decision to arrest a person for bank robbery. The affidavit was insufficient, and the ensuing arrest unlawful.

B. Intentional and Material Omissions From The Affidavit Rendered It Insufficient.

The affiant detective knew that seven persons other than the bank manager, five of whom were in the bank during the robbery, were shown the same photo spread containing the appellant's photograph and were unable to make an identification. Each of these failures occurred prior to Detective Overstrum's obtaining the warrant, which, as elaborated above, was crucially based on the manager's identification. "[B]ecause he did not feel that [this information] was relevant," the officer "consciously failed" to inform the issuing judge of it. Ruling at 15, App. 20. Because the failure was not merely negligent and because the information omitted was material to the finding of probable cause, the warrant was invalid.

When an officer seeking a warrant intentionally misrepresents the underlying facts to the issuing magistrate, or when such a misrepresention, although unintentional, is material to the probable cause determination, the warrant is invalidated. United States v. Pond, 523 F.2d 210, 213-14 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976); United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973); United States v. Dunnings, 425 F.2d 836, 839-40 (2d Cir. 1969). To knowingly give a misleading version of the facts is police misconduct, requiring a deterrent remedy. See United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc); United States v. Belculfine, 508 F.2d 58

(1st Cir. 1974). And if the misrepresentation is material, such that probable cause is vitiated, the arrest is unjustified under the Fourth Amendment, for "no warrant shall issue, but upon probable cause." United States v. Carmichael, supra. An omission of facts bearing upon probable cause can in some cases result in the same sort of misrepresentation of the true situation and can call for the same remedy.

In United States v. Averell, 296 F. Supp. 1004, 1018 (E.D.N.Y. 1969), Judge Judd asked whether "material information was withheld from the Commissioner which would have prevented a finding of probable cause." In that case, the court held that it had not been, because the omissions, if such they were, were insignificant. (The defendant, charged with hijacking a shipment of wigs, could only point to the failure of the affiant to mention that the defendant had a prior business relationship with the victim, that the victim could not positively identify all the wigs, and that the victim had taken a lie detector test with "inconclusive" results.) The omission here, by contrast, goes to the heart of the probable cause in this case. Without reliance on the bank manager's identification, there would be no probable cause here. Yet the affiant did not "feel" it "relevant" to mention that at least five and perhaps seven other eyewitnesses had looked at the same photograph in a spread and failed to make an identification. Moreover, viewed objectively, the officer's "feel[ing] was unreasonable, and his failure to offer the information, it is stipulated,

was "conscious" (that is, intentional) rather than careless (that is, negligent). Compare Pond, supra at 214.

In Morris v. Superior Court, 57 Cal. App. 3d 521, 129 Cal. Rptr. 238 (5th Dist. 1976), the California Court of Appeals issued a mandamus directing the suppression of evidence obtained in the execution of a certain search warrant. The court held that where the affiant "deliberately . . . concealed" important facts undermining the apparent reliability of an anonymous and previously untested informer who claimed personal knowledge, 129 Cal. Rptr. at 252, the "warrant must be quashed without regard to the effect of the omissions on probable cause." Id. at 243. Relying on Averell, supra, the court defined "material facts" in this context as those which "could have negated the magistrate's finding of probable cause" (emphasis added). The intentional failure to disclose material facts "painted a distorted picture which adversely affected the normal inference-drawing process of the magistrate." Id. at 242. In People v. Barger, 40 Cal. App. 3d 662, 115 Cal. Rptr. 298 (1st Dist. 1974), a different panel of the same court ruled that where an affiant officer acted negligently in not ascertaining that his informer had given contradictory information several days previously to a different officer, and thus had not presented this information in his affidavit, the remedy would be to reexamine the affidavit with the omitted information included. (The court held that this information would not have

obviated probable cause.) Detective Overstrum's omission in this case was not negligent in the Barger sense; he knew of the seven other witnesses and "consciously" decided not to tell Judge Kline. But even if this court applied the negligence test, the warrant would fail. The failure of five to seven eyewitnesses to choose the appellant's photograph from a seven photo spread, taken together with a single identification of unknown quality and certainty, would undermine rather than corroborate the confidential informer's credibility. Probable cause would not exist. Thus, whether the court treats the omissions as misconduct under Morris or, on the other hand, simply supplies the missing information and reexamines the supplemental affidavit for probable cause, as in Barger and Averell, the result is the same. The warrant was invalid and the resulting arrest unlawful.

C. The Defendant's Statements Should Be Suppressed.

Any statements made at the scene of an illegal arrest, whether or not preceded by Miranda warnings, are the product of exploitation of the primary illegality and must be suppressed. Brown v. Illinois, supra. The same is true of the appellant's statements to Detective Campbell and Agent Willis later that day. "The road to [the evening statements] from Officer [Overstrum's] unconstitutional [arrest] is both straight and uninterrupted." United States v. Ceccolini, 542 F.2d 136, 142 (2d Cir. 1976). In Ceccolini, this court affirmed an order

suppressing the uncoerced testimony of a witness whose identity had been learned through an unlawful search by a state policeman. The court found no attenuation of the taint, although no agent interviewed the witness until four months after the search. Id. at 138. The court's distinguishing of United States v. Mullens, 536 F.2d 997 (2d Cir. 1976), provides an illuminating contrast. Ceccolini, supra at 142 n.9. In Mullens, the defendant went voluntarily to the police station and, without interrogation, made incriminating admissions designed to exculpate his parents, who had been arrested. Although the earlier search of the Mullens' home and arrest of the parents was held to have been illegal, the defendant's statements were "sufficiently a product of free will to purge the taint of the prior, illegal search." Mullens, supra at 1000. This case is so far from Mullens, and so much less attenuated than Ceccolini, that the result is apparent. The statements should have been suppressed.

CONCLUSION

For the foregoing reasons, the defendant Lewis respectfully requests the judgment of conviction be vacated and that the case be remanded to the District Court with instructions that all incriminating statements of Lewis be suppressed.

Respectfully submitted,

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Dated Feb. 24, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant Lewis' brief and appendix were hand-delivered to the Office of Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 24th day of February, 1977.

Richard S. Cramer

RICHARD S. CRAMER
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